

Below is an Opinion of the Court.


RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case
)	No. 09-31131-rld7
TYRONE BLOCKER,)	
)	
Debtor.)	
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TYRONE BLOCKER,)	Adv. Proc. 09-03361-rld
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
NOMURA HOME EQUITY HOME LOAN,)	
INC., et al.,)	
)	
Defendants.)	

I heard the defendants' Motion for Summary Judgment in this adversary proceeding ("Adversary Proceeding") on August 12, 2010 (the "Hearing") and took the matter under advisement. In his First Amended Complaint ("Amended Complaint") in this Adversary Proceeding, the plaintiff Tyrone Blocker ("Mr. Blocker") purports to assert federal civil RICO claims and related Oregon state tort law claims against the defendants Nomura Home Equity Home Loan, Inc. ("Nomura"), HSBC Bank USA,

1 National Association ("HSBC"), Ocwen Loan Servicing ("Ocwen"), Shapiro &
2 Sutherland LLC ("Shapiro & Sutherland"), and Kelly D. Sutherland ("Mr.
3 Sutherland"). Defendants are referred to collectively herein as the
4 "Defendants." In its essence, Mr. Blocker is asserting that Defendants
5 conspired wrongfully and fraudulently to foreclose his interest in a
6 residence located at 12620 S.E. Cora Street, Portland, Oregon 97236 (the
7 "Property"). He also asserts in the Amended Complaint that the
8 Defendants violated the automatic stay under § 362(a)¹ in his individual
9 chapter 7 bankruptcy case. Defendants deny Mr. Blocker's allegations and
10 assert that they are entitled to summary judgment because Mr. Blocker has
11 no standing to assert the claims set forth in the Amended Complaint, and
12 in any event, "there is no factual nexus between any events complained of
13 and any damage to Mr. Blocker." Defendants' Memorandum of Law in Support
14 of Motion for Summary Judgment, Docket No. 52, at p. 3.

15 I have jurisdiction to decide the Defendants' Motion for
16 Summary Judgment under 28 U.S.C. §§ 1334 and 157(a) and (b).

17 Following the Hearing, I have reviewed the Adversary Proceeding
18 pleadings and the parties' evidentiary submissions, as well as applicable
19 legal authorities. I also have taken judicial notice of the dockets and
20 documents filed in Mr. Blocker's chapter 7 case, case number 09-31131-
21 rld7 ("Blocker Main Case"), and in the chapter 7 case of Mr. Blocker's
22 sister, Cynthia Thompson ("Ms. Thompson"), case no. 09-38579-elp7
23 ("Thompson Main Case") for purposes of confirming and ascertaining facts

24
25 ¹ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the
Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal
Rules of Civil Procedure are referred to as Civil Rules.

1 not reasonably in dispute. Federal Rule of Evidence 201; In re Butts,
2 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa. 2006).

3 This Memorandum Opinion sets forth my conclusions of law in
4 light of the evidentiary record before me pursuant to Civil Rule 52(a),
5 applicable in the Adversary Proceeding pursuant to Rule 7052.

6 Factual Background

7 A. Fact Sources

8 The following facts have been gleaned from the dockets in the
9 Adversary Proceeding, the Blocker Main Case and the Thompson Main Case,
10 and from Defendants' Concise Statement of Facts (Docket No. 51). In his
11 Response to Defendants' Motion for Summary Judgment (Docket No. 65)
12 ("Response"), Mr. Blocker does not contest the factual statements in
13 Defendants' Concise Statement of Facts. However, in his Response, Mr.
14 Blocker does contest the qualifications of Nichelle Jones to authenticate
15 various documents submitted as exhibits to her Declaration, included in
16 Docket No. 50, and supporting statements included in Defendants' Concise
17 Statement of Facts. I treat his objection as raising authentication and
18 hearsay issues with respect to said documents.

19 Federal Rule of Evidence 901(a) requires that documentary
20 evidence be properly authenticated or identified prior to its admission.
21 As a general matter, documents offered as evidence to prove the truth of
22 what they contain are "hearsay." Federal Rule of Evidence 801. However,
23 there is an exception to the inadmissibility of documents as hearsay for
24 documents kept in the course of regularly conducted business activity.
25 Federal Rule of Evidence 803(6).

26 In her Declaration, Ms. Jones declared under penalty of perjury

1 and based on her personal knowledge, that she was employed by Ocwen and
2 was duly authorized to make the statements included in her Declaration.
3 She further declared that she was familiar with the manner and procedures
4 by which Ocwen obtained, prepared and maintained its business records.
5 She declared that such records are prepared and maintained by Ocwen's
6 employees or agents "in the performance of their regular business duties
7 at or near the time, and conditions, and/or event recorded therein." She
8 also stated that she had knowledge of and/or access to Ocwen's business
9 records, and specifically, the Note and Deed of Trust that are subjects
10 of the Adversary Proceeding, and she personally had reviewed the Note and
11 Deed of Trust prior to signing her Declaration. She went on to identify
12 the Note, Deed of Trust and Assignment of the Deed of Trust attached as
13 Exhibits 1, 2 and 3 to her Declaration. Her Declaration was adequate to
14 authenticate those exhibits as business records of Ocwen, kept in the
15 regular course of its business. Accordingly, I overrule Mr. Blocker's
16 objection to consideration of the documents attached as exhibits to Ms.
17 Jones' Declaration, finding them properly authenticated and admissible
18 under the "business records" exception to the hearsay rule. See United
19 States v. Smith, 609 F.2d 1294, 1301-02 (9th Cir. 1979); Sicherman v.
20 Diamoncut, Inc. (In re Sol Bergman Estate Jewelers, Inc.), 225 B.R. 896,
21 901 (BAP 6th Cir. 1998), aff'd, 208 F.3d 215 (6th Cir. 2000); and In re
22 Exide Technologies, 340 B.R. 222, 244 (Bankr. D. Del. 2006).

23 B. Facts in the Record

24 On or about July 28, 2006, Michael D. Feil and Heather A. Feil
25 (the "Feils"), as tenants by the entirety, signed and delivered to
26 American Mortgage Express Financial dba Millennium Funding Group, an

1 adjustable-rate promissory note in the principal amount of \$237,500,
2 bearing interest at 8.625% per annum (the "Note"). The Note was secured
3 by a deed of trust ("Deed of Trust") on the Property, recorded August 7,
4 2006. The beneficial interests under the Note and Deed of Trust were
5 assigned to HSBC, as trustee for the registered holders of Nomura asset-
6 backed certificates, Series 2007-2, by an assignment ("Assignment")
7 recorded on March 25, 2010.

8 Ocwen is the authorized servicing agent for HSBC. Mr.
9 Sutherland of Shapiro & Sutherland was appointed as successor trustee
10 under the Deed of Trust. The Substitution of Trustee form appointing Mr.
11 Sutherland as successor trustee under the Deed of Trust was recorded on
12 April 14, 2008.

13 The Note and Deed of Trust are in default, and monthly
14 installment payments are owing from September 1, 2007 forward. Mr.
15 Sutherland has been instructed to begin foreclosure proceedings with
16 respect to the Property pursuant to ORS 86.700 et seq. Mr. Sutherland
17 currently has possession of the original Note.

18 A quitclaim deed ("Blocker Quitclaim Deed") from the Feils to
19 Mr. Blocker was signed on November 7, 2007 and recorded on December 4,
20 2007. The stated consideration for the transfer of the Property on the
21 Blocker Quitclaim Deed is \$1.00.

22 A quitclaim deed ("Thompson Quitclaim Deed") from Mr. Blocker
23 to Ms. Thompson was signed on February 23, 2009 and recorded on
24 October 16, 2009. The stated consideration for the transfer of the
25 Property on the Thompson Quitclaim Deed is \$25,000, with a \$5,000
26 downpayment.

1 Mr. Blocker filed his chapter 7 petition on February 25, 2009.
2 In spite of Mr. Blocker having transferred all of his "right, title and
3 interest" in and to the property to Ms. Thompson by the Thompson
4 Quitclaim Deed two days earlier, on February 23, 2009, Mr. Blocker
5 asserted under penalty of perjury in his schedules that he was the
6 "owner" of the Property and claimed a homestead exemption in the
7 Property. Blocker Main Case Docket No. 12, Schedules A and C.

8 On April 20, 2009, Mr. Sutherland filed a motion for relief
9 from stay ("Stay Relief Motion") in behalf of HSBC and Ocwen to obtain
10 relief from the automatic stay of § 362(a) in the Blocker Main Case to
11 proceed with foreclosure against the Property. Blocker Main Case Docket
12 No. 25. Mr. Blocker opposed the Stay Relief Motion. Blocker Main Case
13 Docket Nos. 27 and 31. Following a hearing, the Stay Relief Motion was
14 granted by order ("Blocker Stay Relief Order") entered on May 27, 2009.
15 Blocker Main Case Docket No. 46. On August 28, 2009, Mr. Blocker filed a
16 motion to vacate the Blocker Stay Relief Order. Blocker Main Case Docket
17 No. 83. On September 17, 2009, Mr. Blocker filed a motion to reconsider
18 the Blocker Stay Relief Order, essentially reiterating and expanding on
19 his arguments made in the motion to vacate the Blocker Stay Relief Order.
20 Blocker Main Case Docket No. 91. Following review of the documents and
21 pleadings filed, the bankruptcy court denied Mr. Blocker's motion to
22 vacate the Blocker Stay Relief Order, by order entered on September 18,
23 2009. Blocker Main Case Docket No. 93. Further, following review of the
24 documents and pleadings filed, the bankruptcy court denied Mr. Blocker's
25 motion to reconsider the Blocker Stay Relief Order, by order entered on
26 September 21, 2009. Blocker Main Case Docket No. 95. Mr. Blocker filed

1 a timely notice of appeal of the bankruptcy court's order denying his
2 motion to vacate the Blocker Stay Relief Order on September 30, 2009.
3 Mr. Blocker filed a motion for a stay pending appeal on October 9, 2009.
4 Blocker Main Case Docket No. 106. Following review of the documents and
5 pleadings filed, the bankruptcy court denied Mr. Blocker's motion for
6 stay pending appeal by order entered on October 14, 2009. Blocker Main
7 Case Docket No. 110. Mr. Blocker filed a notice of appeal of the
8 bankruptcy court's denial of his motion for stay pending appeal on
9 October 22, 2009. Blocker Main Case Docket No. 118. Mr. Blocker's two
10 appeals have been consolidated and are pending before the district court.
11 See United States District Court for the District of Oregon Appeal Nos.
12 10-CV-127-KI and 10-CV-623-KI.

13 Ms. Thompson filed her chapter 7 petition on October 19, 2009.
14 In her schedules, Ms. Thompson claimed a "rent to own" ownership interest
15 in the Property but did not claim a homestead exemption in the Property.
16 Thompson Main Case Docket No. 18, Schedules A and C. Mr. Sutherland
17 filed a motion for relief from stay ("Thompson Stay Relief Motion") in
18 behalf of HSBC and Ocwen to obtain relief from the automatic stay of
19 § 362(a) in the Thompson Main Case to proceed with foreclosure against
20 the Property. Thompson Main Case Docket No. 10. Ms. Thompson opposed
21 the Thompson Stay Relief Motion. Thompson Main Case Docket No. 17.
22 Following a series of hearings, including a final evidentiary hearing on
23 March 16, 2010, the bankruptcy court granted the Thompson Stay Relief
24 Motion by order ("Thompson Stay Relief Order") entered on March 23, 2010.
25 Thompson Main Case Docket No. 52. Ms. Thompson filed a notice of appeal
26 of the Thompson Stay Relief Order on April 7, 2010. Thompson Main Case

1 Docket No. 54. Ms. Thompson's appeal is pending before the district
2 court. See United States District Court for the District of Oregon
3 Appeal No. 10-CV-1018-KI.

4 Legal Discussion

5 A. Summary Judgment Standards

6 Granting a motion for summary judgment is appropriate only if
7 there is no genuine dispute as to any material fact, and the moving party
8 is entitled to judgment as a matter of law. Civil Rule 56(c); Rule 7056;
9 State Farm Mutual Auto Ins. Co. v. Davis, 7 F.3d 180, 182 (9th Cir.
10 1993). "Material facts" are such facts as may affect the outcome of a
11 case under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
12 248 (1986). A dispute concerning a material fact is "genuine" only if
13 there is sufficient evidence to justify a finding in favor of the non-
14 moving party. Id. However, all justifiable inferences from the evidence
15 presented are to be considered in favor of the non-moving party. Id. at
16 255.

17 The moving party bears the initial burden of demonstrating that
18 there are no genuine issues of material fact. T.W. Elec. Serv., Inc. v.
19 Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).
20 However, once the moving party has met that burden, the burden shifts to
21 the non-moving party to "set forth, by affidavit or as otherwise provided
22 in Rule 56, 'specific facts showing that there is a genuine issue for
23 trial.'" Horphag Research Ltd. v. Garcia, 475 F.3d 1029, 1035 (9th Cir.
24 2006) (quoting T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,
25 809 F.2d at 630). The non-moving party cannot rely on the allegations in
26 its pleadings to meet that burden. Nelson v. Pima Community College, 83

1 F.3d 1075, 1081-82 (9th Cir. 1996) ("[M]ere allegations and speculation
2 do not create a factual dispute for purposes of summary judgment").

3 B. Standing

4 Defendants argue that to the extent Mr. Blocker's claims for
5 relief arose prior to the filing of his chapter 7 petition, those claims
6 belong to his bankruptcy estate, rather than to him individually, and the
7 real party in interest to assert such claims is the chapter 7 trustee.
8 In addition, the defendants also argue that Mr. Blocker lacks standing
9 because he conveyed all of his right, title and interest in and to the
10 Property to Ms. Thompson by the Thompson Quitclaim Deed two days prior to
11 his bankruptcy filing.

12 The question of standing involves both "constitutional
13 limitations on federal court jurisdiction and prudential limitations on
14 its exercise." Warth v. Seldin, 422 U.S. 490, 498 (1975). Standing as a
15 constitutional matter concerns whether the plaintiff's personal stake in
16 the subject litigation is sufficient to constitute a "case or
17 controversy" to which the federal judicial power may extend under Article
18 III of the Constitution. Lujan v. Defenders of Wildlife, 504 U.S. 555,
19 559-60 (1992). Prudential standing "is comprised of both judicially-
20 created limitations, such as the prohibition on third-party standing ...
21 and statutorily-imposed limitations, such as the [Civil] Rule 17(a)
22 requirement" that claims be maintained by the real party in interest.
23 Gilmartin v. City of Tucson, 2006 WL 5917165 *4 (D. Ariz. 2006) (citing
24 Lee v. Deloitte & Touche LLP, 428 F. Supp. 2d 825, 831 (N.D. Ill. 2006).

25 With regard to the argument that the estate rather than Mr.
26 Blocker owns any prepetition claims asserted by Mr. Blocker in the

1 Adversary Proceeding, I note that from the outset of his chapter 7 case,
2 Mr. Blocker claimed a homestead exemption with respect to the Property
3 that in effect would be eliminated by a foreclosure sale. However, in
4 any event, Mr. Blocker entered into a settlement ("Settlement") with his
5 chapter 7 trustee pursuant to which, in consideration of Mr. Blocker
6 withdrawing his objection to settlement of an estate claim against State
7 Farm and waiver of any claim of exemption with respect to the State Farm
8 settlement proceeds, the trustee abandoned any estate claims to the
9 Property and to the claims asserted by Mr. Blocker in the Adversary
10 Proceeding. See Blocker Main Case Docket No. 184. The Settlement notice
11 provided that it would be effective if no objection was filed within 23
12 days after the Settlement notice date of February 18, 2010. No such
13 objection was filed; so, the Settlement became effective. Any
14 prepetition claims asserted in the Adversary Proceeding accordingly were
15 abandoned to Mr. Blocker.

16 Mr. Blocker is on considerably thinner ice for standing
17 purposes in light of his conveyance of all right, title and interest in
18 and to the Property to his sister, Ms. Thompson, by means of the Thompson
19 Quitclaim Deed two days prior to his bankruptcy filing. The Thompson
20 Quitclaim Deed subsequently was recorded. However, the relationship
21 between Mr. Blocker and Ms. Thompson with respect to the Property is
22 confused in light of the schedules they have filed in their separate
23 bankruptcy cases.

24 Mr. Blocker claims under penalty of perjury that he owns the
25 Property and further claims a homestead exemption in the Property, in
26 spite of the evidence of the Thompson Quitclaim Deed. Ms. Thompson

1 claimed only a "rent to own" interest in the Property under penalty of
2 perjury and did not claim a homestead exemption in the Property. In
3 these circumstances, Mr. Blocker might not be able to withstand a
4 standing challenge at trial, but I conclude, based on the contradictory
5 evidentiary record before me, that a genuine issue of material fact
6 exists as to whether Mr. Blocker in fact maintains an ownership interest
7 in the Property, precluding summary judgment against him on the standing
8 issue.

9 C. Lack of Evidence to Support the Claims for Relief

10 Despite my conclusion that granting summary judgment on the
11 standing issues raised by Defendants is inappropriate, my ultimate
12 conclusion is that summary judgment must be entered in favor of the
13 Defendants against Mr. Blocker on all of his asserted claims for relief
14 in the Amended Complaint for the following reasons.

15 1. Claims for Violation of the Automatic Stay

16 Mr. Blocker has provided no evidence that any of the Defendants
17 has violated the automatic stay of § 362(a) in his bankruptcy case. Mr.
18 Blocker has not provided an affidavit to support his stay violation
19 allegations. Further, my review of the records in both the Adversary
20 Proceeding and the Blocker Main Case indicates nothing more than that the
21 Defendants pursued the Stay Relief Motion to its conclusion with the
22 entry of the Blocker Stay Relief Order. Once the Stay Relief Motion was
23 granted, and no stay pending appeal was imposed, the Defendants
24 apparently rescheduled a foreclosure sale of the Property. However,
25 foreclosure was again stayed by Ms. Thompson's bankruptcy filing. While
26 relief from stay was granted by the Thompson Stay Relief Order in the

1 Thompson Main Case, there is no evidence in the record before me that a
2 foreclosure sale of the Property has in fact taken place. As a bottom
3 line matter, there is nothing in the record that supports Mr. Blocker's
4 claim for relief based on Defendants' alleged violation of the automatic
5 stay of § 362(a) in Mr. Blocker's bankruptcy case. In addition, I
6 conclude that Mr. Blocker has no standing to pursue any alleged violation
7 of the automatic stay in Ms. Thompson's bankruptcy case. Accordingly,
8 summary judgment in Defendants' favor is appropriate on Mr. Blocker's
9 claim for relief based on alleged violations of the automatic stay, as
10 there is no genuine issue of material fact as to any such violation of
11 the stay claim.

12 2. Wrongful and Fraudulent Conspiracy to Foreclose

13 While Mr. Blocker's allegations of civil RICO and state law
14 tort claims go on at great length in his Amended Complaint, in their
15 essence, he is alleging that Defendants have no right to foreclose his
16 interest in the Property, and they have wrongfully, fraudulently and
17 illegally conspired to complete such a foreclosure.

18 At the outset, as noted above, there is no evidence in the
19 record that a foreclosure of Mr. Blocker's interest, if any, in the
20 Property has been completed. To the extent that Mr. Blocker is asserting
21 a claim for damages based on such a wrongful foreclosure, the event
22 leading to such potential damages has not occurred, and his claim is not
23 ripe for determination.

24 However, the uncontradicted evidence in the record before me is
25 that the Defendants in their respective roles have every right to pursue
26 a foreclosure sale of the Property, and they have done nothing wrongful,

1 fraudulent or illegal. If Mr. Blocker has any evidence of such
2 wrongdoing on the part of any of the Defendants, he has not presented it,
3 and he has presented no evidence in opposition to the Defendants'
4 appropriately supported Motion for Summary Judgment to establish that
5 there is any genuine issue of material fact on the issue of damages
6 resulting to him from the alleged wrongful, fraudulent or illegal conduct
7 of any of the Defendants. In short, Mr. Blocker has emphatically stated
8 his claims against the Defendants in the Amended Complaint, but when he
9 was required to present some evidence tending to establish the existence
10 of a genuine issue of material fact in opposition to Defendants' Motion
11 for Summary Judgment, he defaulted. His citations to ORS § 73.0104(5)
12 and UCC § 3-409(1) [ORS § 73.0409(1)] are unavailing because he does not
13 provide any explanation as to why they should be treated as talismans
14 that shield him from the requirement to produce evidence in support of
15 his claims. I conclude that the Defendants have established that they
16 are entitled to summary judgment on all of Mr. Blocker's claims asserted
17 against them in the Amended Complaint.

18 Conclusion

19 Defendants' Motion for Summary Judgment is supported by the law
20 and the evidentiary submissions included in their supporting
21 declarations. My review of the documents filed and dockets in the
22 Adversary Proceeding, the Blocker Main Case and the Thompson Main Case
23 provides nothing that would contradict Defendants' entitlement to summary
24 judgment. Mr. Blocker has not submitted any evidence tending to
25 establish the existence of a genuine issue of material fact with respect
26 to any of the claims for relief asserted in his Amended Complaint.

1 Accordingly, I conclude that Defendants are entitled to summary judgment
2 in their favor on all claims asserted against them in the Amended
3 Complaint. Mr. Esterkin should submit an order and judgment consistent
4 with the conclusions set forth in this Memorandum Opinion within the next
5 ten days.

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7 cc: Tyrone Blocker
8 James N. Esterkin
9 David B. Mills
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